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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-886

WESLEY-JESSEN INC., AN ILLINOIS CORPORATION, AND DR. NEWTON K. WESLEY,

Petitioners,

vs.

MARCELLO CHIQUIAR ARIAS,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

Allan D. Mockabee
BEEHLER, MOCKABEE,
ARANT & JAGGER
3435 Wilshire Boulevard, Suite 1100
Los Angeles, California 90010
(213) 385-7087
Attorney for Respondent

Roy E. Hofer
Peter E. Heuser
Chicago, Illinois
Of Counsel

IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1978

NO. 78-836

WESLEY-JESSEN INC.,
an Illinois corporation,
and DR. NEWTON K. WESLEY,

Petitioners,

v.

MARCELO CHIQUIAR ARIAS,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners filed a Complaint for Declarator, Judgment of a controversy between Petitioners and Respondent, jurisdiction being based upon diversity of citizenship.

Petitioners, on page 8 of the Petition, allege "...the Petitioners have asserted that the Respondent was under a duty pursuant to the written agreement dated March 4, 1960 to make such disclosures and that by the very terms of said written agreement the Petitioners could use such disclosures without charge... In essence, the dispute is as to what royalty or monies, if any, Respondent is entitled to receive from the Petitioners." The effect of an adjudication in favor of Petitioners would be to require Respondent to specifically perform what Petitioners allege to be the obligations of Respondent

under said agreement of March 24, 1960.

The agreement provides that controversies arising thereunder shall first be submitted for arbitration by the American Arbitration Association for arbitration under the rules of that association before either party shall resort to litigation in the courts.

The United States District Court, Northern District of Illinois, Eastern Division, Judge Decker, upon the motion of Respondent, stayed proceedings in the District Court pending arbitration. The Seventh Circuit Court of Appeals dismissed Petitioners' appeal on the ground that the stay was not a final appealable decision under Title 28 U.S.C. 1291. Petitioners requested a rehearing before the Circuit Court of Appeals on the ground that the appeal was prosecuted under 28 U.S.C. 1292(a)(1) rather than 1291, and

rehearing was denied.

The Petition for a Writ of Certiorari is based upon what Petitioners allege to be a District Court decision in direct conflict with the Enelow-Ettelson rule established by the Supreme Court of the United States and decisions of other appellate circuits and of this Court.

On page 9 of their Brief Petitioners digress from the petitioned question of appealability of the District Court's order staying proceeding there and similarly on page 13 of their Brief, argue that the District Court disregarded the Illinois Arbitration Statute in effect at the time of the execution of the agreement of March 24, 1960. This is urged by Petitioners in spite of the explicit language of the arbitration clause set forth in the appendix to Petitioners Brief at A3 which states that in the event of a dispute

which may arise under the provisions of the agreement, "then before any party shall have the right to submit the matters involved to litigation in the courts of law, the matter shall be submitted to the American Arbitration Association and settled in accordance with the rules of the Association." The Illinois Arbitration Act was not invoked nor does it apply.

The Enelow-Ettelson Rule

The basis for the rule is Enelow v. New York Life Insurance Company, 293 U.S. 379 (cited by Petitioners as 293 U.S. 397) and Ettelson v. Metropolitan Life Insurance Company, 317 U.S. 188. This rule is that the stay of a law action to first try an equitable defense is the grant of an injunction and appealable under 28 U.S.C. 1292.

In the present case there is not a stay of a law action to first try an equitable

defense. It is a stay of all the issues raised by the Complaint in order to first hear and determine all of the issues by arbitration before resorting to the courts.

The action brought by Petitioners lies in equity. It requests the court to enforce the contract between the parties. The Enelow-Ettelson rule does not bar the stay. This rule is clearly stated in Baltimore Contractors, Inc. v. Jacob H. Bodinger, 348 U.S. 176, 99 Led 233, 75 SCt. 249 (1954), as follows:

> "The power to stay proceedings in another court appertains distinctively to equity in the enforcement of equitable principles, and the grant or refusal of such a stay by a court of equity of proceedings and law is a grant or refusal of an injunction in the meaning of Section 129 [Section 1292]."

In Baltimore Contractors, Mr. Justice Reed in the opinion of the Court stated "We affirmed, holding that the Enelow rule did not apply; that since this was an equitable

proceeding with a counterclaim to enforce the policy, the decision to hear the reformation issue first without a jury was only a decision as to how to try the case, and therefore was not an interlocutory order in the nature of an injunction." It is urged by respondent that the stay in the District Court was not an interlocutory injunction staying a legal action but merely a decision as to the manner in which all the issues were to be tried, namely, by arbitration as a procedure to be followed prior to litigation.

Again in Baltimore Contractors, in applying Morgantown v. Royal Ins. Co., 337 U.S. 254, 93 Led 1347, 68 SCt 1067, it was stated

> "The Morgantown Case controls here. Whether the District Court was right or wrong in its ruling that the contract provision did not require arbitration proceedings, it was simply a ruling in the only suit pending, actual or fictional. It was a mere order and not an injunction as that word is understood through the Enelow and the Ettelson Cases as

> a stay through equitable principles of a common-law action. This present case is to be distinguished from the Shanferoke Coal and Supply Corp. Case, 293 US 449, 79 Led 583, 55 SCt 313, supra, note 5, in the same way. There in a common-law action a motion for an interlocutory injunction on an equitable defense was refused. The order was appealable under Judicial Code Section 129."

The United States District Court and the United States Circuit Court of Appeals for the Seventh Circuit did not disregard the Enelow-Ettelson rule, nor did they disregard Shanferoke Coal, Baltimore Contractors, or Morgantown v. Royal Insurance, but to the contrary, the courts below conformed to the law of those cases.

There Is No Conflict With The Decisions Of Other Circuits

In Travel Consultants v. Travel Management Corporation, 367 F2d 334, D.C. Cir. 1966, appeal was heard upon the stay of a law issue, and the stay was affirmed. Upon an equity issue the appeal was dismissed. In

Standard Chlorine of Delaware v. Leonard, 384 F2d 304 (2d Cir. 1967) the stay order was found not to be appealable.

In American Safety Equipment v. J. P. McGuire Company, Inc., 391 F2d 821 (2d Cir. 1968) again there was an action at law and a stay granted for prior determination of an equitable arbitration defense contrary to the Enelow-Ettelson rule.

In Power Replacements, Inc. v. Air Preheater Co., Inc., 426 F2d 930 (9th Cir. 1970) there was no agreement between the parties to submit to arbitration as a condition precedent to resorting to the court.

The Fifth Circuit in Wallace v. Norman Industries, Inc., 467 F2d 824 (1972) held that an effort to procure a stay of an action in Alabama pending the outcome of an appeal in Illinois was not to permit a prior determination of an equitable defense or counterclaim and thus the order denying the stay was not

an interlocutory order appealable under Title 28 U.S.C. 1292(a)(1).

J. S. & H. Construction Company v. Richmond County Hospital Authority, 473 F2d 212 (5th Cir. 1973) is the only case relied upon by petitioner in which it appears that an arbitration clause does make arbitration a condition precedent to legal action. The action was one at law for value of work and materials under a construction contract. The stay rightly was held appealable because it was an injunction against a law action.

We then come to Zell v. Jacoby-Bender Inc., 542 F2d 34 (7th Cir. 1976). This was an action by a sales representative seeking an accounting of commissions. The Seventh Circuit Court of Appeals held that where the accounts between the parties were not of such a complicated nature that only a court of equity could satisfactorily unravel them, the action was one at law and a stay

pending arbitration was appealable as an interlocutory injunction under Title 28 U.S.C. 1292(a)(1).

However, this case is of particular interest in the instant factual situation. In Zell the parties entered into a contract in 1955; the Illinois Arbitration and Awards Statute, 10 Ill. Rev. Stat., 1-30, which went into effect July 1, 1919 and was superseded August 24, 1961 by Smith-Hurd, Ill. Stat., Title 10, Sec. 101 (Ill. L 1971, p. 3844, Sec. 1).

The situation is chronologically parallel to that in the present case.

The agreement in Zell provided

> "This agreement shall be construed, interpreted and enforced according to the laws of the State of New York, and all claims, demands, disputes, differences, controversies and misunderstandings, the disposition of which is not specifically herein provided for, shall be submitted to be determined by arbitration, pursuant to the rules of the American Arbitration Association

> then obtaining; and judgment on the award may be entered in any court having proper jurisdiction."

The Federal Arbitration Act Applies To The Contract Between The Parties

> "The plaintiff was also correct in his assertion that federal law governs the validity of an arbitration agreement when the Federal Arbitration Act is applicable."

In Wilko v. Swan, 346 U.S. 427, 74 Sct 182, 98 Led 168 (1953) this court stated that the Federal Arbitration Act applies to "...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof." (citing 9 U.S.C. 2). The contract between

the parties here involves commerce as shown by a quoted portion thereof in the appendix A hereto.

The Circuit Court Of Appeals
For the Seventh Circuit
Supports Respondent's Position

In United Transportation Union v. Illinois Central Railroad Company, 433 F2d 566, 568, the Seventh Circuit in 1970 held

> "The present situation is analogous to the treatment of stay orders by the district court pending arbitration proceedings. Where a district court has been faced with a dispute and has stayed such dispute pending an initial proceeding for arbitration on the merits, the courts have held that such a stay was not a final appeal order. Baltimore Contractors v. Bodinger, 348 U.S. 176, 179, 78 SCt 249, 99 Led 233 (1955); Alexander v. Pacific Maritime Association, 332 F2d 266, 267 (9th Cir. 1964); Armstrong, Norwalk Rubber Corp. v. Local Union No. 283, 269 F2d 618 (2d Cir. 1959)." (Emphasis supplied).

The stay granted in the present case is not one to stay proceedings in another court nor is it one to permit the prior arbitration of an equitable defense before proceeding with trial on the merits. It is a stay for the purpose of arbitrating the controversy between the parties on the merits before embarking upon a litigation procedure on the merits in a court of law.

CONCLUSION

The Petitioners Writ should be denied. The ruling of the Circuit Court of Appeals for the Seventh Circuit in denying Petitioners Appeal does not run counter to the Enelow-Ettelson rule, Baltimore Contractors v. Bodinger, Shanferoke Co., or any of the rulings of these several circuits whose decisions were cited by Petitioners. Respondent is not attempting to stay proceedings in the District Court to arbitrate an equitable defense in a law action. The stay was secured to arbitrate,

as expressly agreed upon between the parties, the merits of the controversy between the parties.

Inasmuch as the written agreement of the parties is to arbitrate by submission to the American Arbitration Association for action under its rules, and in view of the fact that the contract between the parties involves commerce, arbitration properly comes under the Federal Arbitration Act.

Respectfully submitted,

Allan D. Mockabee
BEEHLER, MOCKABEE, ARANT & JAGGER
3435 Wilshire Boulevard, Suite 1100
Los Angeles, California 90010
(213) 385-7087

Roy E. Hofer
Peter E. Heuser
Chicago, Illinois

Of Counsel

APPENDIX

The contract between Petitioners and Respondent dated March 24, 1960, states in part:

"1. The parties have organized and recorded a Mexican company called Plastic Contract Lens De Mexico, S.A., in accordance with the laws of the Republic of Mexico..."

"3. The objects of the Company shall be: The manufacture, preparation, acqusition by any legal means, sale, import and export of and dealing in materials, machinery, equipment, processes and techniques of all kinds related to contact lens; and to engage in all civil or mercantile activities permitted by law."

ASSIGNMENT

For value received the undersigned, NEWTON K. WESLEY and GEORGE N. JESSEN of Chicago, Illinois, hereby assign, transfer and set over to THE PLASTIC CONTACT LENS COMPANY, an Illinois corporation, all of their right, title and interest in and to that certain agreement dated March 24, 1960, between the undersigned and MARCELO CHIQUIAR ARIAS, JAVIER BARONA YANEZ, VICTOR CHIQUIAR ARIAS, and PLASTIC CONTACT LENS DE MEXISO, S.A., relating to the organization of PLASTIC CONTACT LENS DE MEXICO, S.A., and other related matters subject to all of the terms and conditions thereof.

Dated at Chicago, Illinois, November 3, 1960.

/s/ Newton K. Wesley (SEAL)
NEWTON K. WESLEY

/s/ George N. Jessen (SEAL)
GEORGE N. JESSEN

1 Ill. Rev. Stat. 1959, ch. 10, §1, Page 194. (Arbitration and Awards)

[1. Submission of controversy to arbitrators.]
§1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That all persons having a requisite legal capacity may, by an instrument in writing to be signed by them, submit to one or more arbitrators to be named in the manner indicated by such writing, any controversy existing between them, and may, in such submission, agree that any court of competent jurisdiction, or any court therein named (provided it is of competent jurisdiction) may pass upon any questions of law arising in such arbitration proceedings, and that a judgment, or successive judgments, of such court shall be rendered upon the award made pursuant to such submission, and for payment of fees and costs of the arbitration or arbitrators. [As amended by act approved June 23, 1919. In force July 1, 1. 1919, p. 216.]

1 Ill. Rev. Stat., 1977, ch. 10, §101, page 189. (Uniform Arbitration Act)

101. §1. Validity of arbitration agreement. A written agreement to submit any existing controversy to arbitration or a provision in a written agreement to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract, except that any agreement between a patient and a hospital or health care provider to submit to binding arbitration a claim for damages arising out of (1) injuries alleged to have been received by a patient, or (2) death of a patient due to hospital or health care provider negligence or other wrongful act, but not including intentional torts, is also subject to the Health Care Arbitration Act.

1 Ill. Rev. Stat. 1977, ch. 10 §119, page 191. (Uniform Arbitration Act)

119. §19. (Act not retroactive.) This Act applies only to agreements made subsequent to the effective date of this Act.